IN THE

Supreme Court of the United States

October Term, 1948
No. 446

WILLIS ALLEN, ROY G. OWENS, and CAMPAIGN COMMITTEE FOR CALIFORNIA BILL OF RIGHTS INITIATIVE CONSTITUTIONAL AMENDMENT, INC., a corporation,

Petitioners,

vs.

ARTHUR JAMES McFADDEN and FRANK M. JORDAN as Secretary of the State of California,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California and Brief in Support Thereof.

KENNY AND COHN,
By ROBERT W. KENNY,
629 S. Hill Street,
Los Angeles 14, California;
WELBURN MAYOCK,
1400 29th St., N.W.,
Washington, D. C.,
Attorneys for Petitioners.

Of Counsel:
LAWRENCE W. ALLEN,
1204 South Hill Street,
Los Angeles 15, California;
PAUL F. FRATESSA,
901-907 Hearst Bldg.,
San Francisco, Calif.;
WILLIAM S. SPARKS,
Hearst Bldg.,
3rd and Market Streets,
San Francisco, Calif.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

TEXTBOOKS

IN THE

Supreme Court of the United States

October Term, 1948

No. .....

WILLIS ALLEN, ROY G. OWENS, and CAMPAIGN COMMITTEE FOR CALIFORNIA BILL OF RIGHTS INITIATIVE CONSTITUTIONAL AMENDMENT, INC., a corporation,

Petitioners,

vs.

ARTHUR JAMES MCFADDEN and FRANK M. JORDAN as Secretary of the State of California,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioners pray that a Writ of Certiorari issue to review a peremptory writ of mandate issued by the Supreme Court of the State of California on Sept. 3, 1948, pursuant to an opinion of said court dated Aug. 3, 1948.

Statement of Matter Involved.

Petitioners had succeeded in qualifying a proposed initiative constitutional amendment for the general election ballot of Nov. 2, 1948. This had been accomplished by securing 273,549 signatures of registered qualified electors in California to an initiative petition. All of the mechanical and procedural requirements of the state constitution and laws on the subject of Initiative were complied with, and are not involved in this petition.

But after the Secretary of State of the State of California had made his formal announcement that the proposed initiative constitutional amendment had qualified for the ballot, the respondent McFadden applied directly to the Supreme Court of the State of California and obtained a peremptory writ of mandate ordering the respondent Secretary of State not to place the proposed amendment on the ballot or to submit it to the vote of the people.

The petitioners had qualified the proposed constitutional amendment for the ballot under the Initiative provisions of Article IV, Section 1 of the State Constitution adopted in 1911 which provide that the legislative power of the state is vested in the Legislature but that "the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature"; and also reserve the power, to reject by referendum any act passed by the Legislature.

Respondent McFadden sought and obtained the peremptory writ of mandate which prevented the proposed amendment from appearing on the ballot on the ground that it was "revisory" in nature rather than "amendatory," and therefore could only be submitted in accordance with

another article of the State Constitution, namely Article XVIII, Section 2, adopted in 1879.

Article XVIII, Section 2 of the State Constitution, in three separate and distinct places, in its own language, shows with unmistakable clarity that the "revision" referred to therein is only such a revision undertaken under the provisions of said Article XVIII where one entire constitution is substituted for the entire constitution then existing.

Admittedly, the constitutional amendment proposed by the petitioners under the newer Initiative provisions of Section IV of the State Constitution, did not purport to be and actually was not, the substitution of one entire constitution for another. It did not change the form of government. Many of the provisions of the existing constitution were entirely untouched; some of them were slightly altered; while the taxation provisions were materially altered.

But "tyrants always find a pretext for their tyranny." The respondent McFadden prevailed in his contention that the proposed amendment was a "substantial revision" despite the state court's legal duty to uphold the initiative process, and notwithstanding the fact that every intendment of the law is in favor of the people and the initiative.

The writ of mandate ignores Article IV, Section 1 (the initiative provisions) of the State Constitution and prevents the people from using its plain provisions. In effect, it deprives the people of the use and benefit of the principle placed by the people in their constitution by which they reserved to themselves the power to "propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature."

The respondent McFadden, if not prevented by this court, will usurp the people's legislative powers, and the judiciary will become the censor of those measures which the people may be permitted to vote upon.

The writ of mandate constitutes a reversal of a former decision of the state court in 1938 which permitted the submission to the electorate of a somewhat similar proposed constitutional amendment containing more than one subject matter. See *Brown v. Jordan,* 12 Cal. 2d 75, 82 P. 2d 450. The writ of mandate nullifies important constitutional rights upon which the people have relied in the past and upon which they must rely in the future.

Hereafter in each individual case as presented (after old people have trudged the streets and secured the hundreds of thousands of signatures required and spent their money on the other necessary expenses of a campaign for signatures) there will remain the constant peril of adverse judicial determination as to how many subjects could have been included in any given proposed initiative constitutional amendment.

In other words, unless petitioners prevail, the judiciary will control all future direct legislation.

Petitioners contend that a restriction on the power to propose multi-subject amendments, imposed by a principal (the people) upon its agent (the legislature) cannot be interpreted to bind the principal when it chooses to act independently of the agent.

Finally, petitioners contend that where the people's right to exercise their expressly reserved legislative powers are usurped, then to that extent the people are deprived of a republican form of government guaranteed them by the federal constitution.

The untrammeled use of the initiative by which the people may make laws and amend their state constitution at the polls *independent of the Legislature* is an integral and important component part of the republican form of government in California. And this is particularly so, in a state where for 14 years the Legislature has blocked the calling of a constitutional convention, to revise the constitution, despite a popular vote in favor of such a convention.

> "In 1933 the Legislature submitted the question of calling a constitutional convention to the voters. (Assembly Concurrent Resolution No. 17.) This proposal received a vote of 705,915 for to 668,080 against. . . . The Legislature finally took no action." Page 322 of Constitutional History of California, compiled by Paul Mason for the California State Senate, 1947.

Petitioners rely upon the doctrine of *Obsta Principiis*. We must withstand and oppose the beginnings of tyranny. We must resist the first approaches or encroachments by the judiciary upon the legislative rights of the people. The people are not required to wait until all of the elements of a republican form of government have been swept away or usurped, before they may complain that a republican form of government is not being maintained. If the people wait that long, there might be no tribunal to which we could complain.

Petitioners respect the language of Justice Bradley in *Boyd v. U. S.*:

> "It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be '*Obsta principiis.*'" (116 U. S. 616, 635, 6 Sup. Ct. 535, 29 L. Ed. 746.)

Here is a cry that springs from the people, from the very grass roots. It should not go unheeded, lest the people's spirit be broken, lest they become disillusioned, cynical, embittered, left without the will to resist encroachments upon democracy.

Petitioners ask this court to hear the people's plea, to grant this application for writ of certiorari to the Supreme Court of the State of California, to hear in open court the people's case.

Statement as to Jurisdiction.

The jurisdiction of this Court is based upon 28 U. S. C. A. 1257; the Constitution of the United States, Article IV, Section 4 which guarantees a republican form of government; the 9th and 10th Amendments to that Constitution; and 8 U. S. C. A. 43, Section 1979 Revised Statutes which gives a cause of action to every person who "under color of any statute, ordinance, regulation, custom or usage, of any state" has been deprived of any right, privilege or immunity secured by the Constitution.

The right of the citizens of California to use and enjoy their reserved political powers is at stake. If, by any pretext, the citizens are prevented from the exercise of those

rights which the citizens of California have expressly reserved as an integral part of a republican form of government in California, then a republican form of government is not being maintained, and the citizens' only recourse is to this Court.

The writ of mandate in this case prevents popular action upon the proposed initiative constitutional amendment by means of the initiative provisions of the state constitution. If the writ is left undisturbed then, indeed, the people of California are helpless.

It is no answer to tell the people they still have the right to replace the members of the Legislature. The people should not be forced to turn back the political clock to the period before 1911 when the Initiative provisions of the state constitution were adopted.

> "The chief reason for the spread of direct legislation in the United States is to be found in the impatience of the people with the work of their state legislatures. By reason of the lack of authoritative leadership, the persistent lobbying on the part of special interests and the intermittent control of legislative bodies by political bosses a great deal of dissatisfaction with the work of these legislatures developed during the closing years of the 19th century. People came to the conclusion that by their own direct action they could hardly do worse and might do better. Consequently they took into their own hands the power to make and to reject laws not as a procedure for every day use, but merely as a method to be used when the desired results could not be had in any other way." William B. Munro Vol. 8 Encyclopedia of the Social Sciences 51.

Are the people of California to be told all over again that the people's only remedy is to change the members of the Legislature? That is precisely the reason the people took back from the Legislature the exclusive power to initiate legislation. Unless this petition is granted, the people will be deprived of the use of one of the essential component parts of that which the people have ordained as a republican form of government in California. Petitioners must, and do look now to the federal guarantee.

Ours is a government of delegated powers, with the people reserving and exercising the powers of the sovereign. (9th and 10th Amendments of the Constitution.) The delegated powers are conferred upon the three distinct branches of government, with each independent of the others. Under the doctrine of separation of powers, which arises out of the central premise that each branch of government is independent, no branch of the government may directly or indirectly attempt to control or interfere with the exercise of powers delegated to other branches.

If the people are to retain their sovereign power as reserved by the Ninth and Tenth Amendments—their independence as a part and as the source of all government—then the principles underlying the doctrine of separation of powers must be applied to strike down any attempt of the judiciary to interfere with the otherwise lawful exercise by the people of their legislative functions.

After a law has been enacted, or after an amendment has been adopted, the judiciary may hold a part or all of it to be unconstitutional. That is its right; that is its duty in a proper case. But the judiciary may not limit

or give orders even to the Legislature upon what laws it may vote. Much less may the judiciary forbid the people, the sovereign, to vote upon any amendments the people may choose to propose. Objections by the judiciary to the substance of the law or amendment may only be expressed after adoption—not before. To do so is to trench upon the reserved powers of the people.

When the late Chief Justice Stone called for the exercise of judicial self-restraint he said: "For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government." *U. S. v. Butler*, 297 U. S. 1, 79.

By this petition this Court is called upon not to strike down a state law, but to restore to the people the right to the ballot and to the democratic processes reserved to them.

The word "Republican" breaks down into two Latin words. "Re" meaning "back to"; and "Publicus," from "populous" meaning "the people." Hence a republican form of government means a government with a form which goes back to the people.

In *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440, Wilson, J., said:

> "As a citizen, I know the government of that state (Georgia) to be republican; and my short definition of such a government is—one constructed on this principle, that the supreme power resides in the body of the people."

Nov. 2, 1948, the day upon which California Bill of Rights initiative constitutional amendment was entitled to appear upon the California ballot, has come and gone. But the framers of the Initiative provisions of the California State Constitution had foresight. They knew that attempts would be made to thwart a vote upon qualified initiative measures. Therefore, they wisely provided that "if for any reason any initiative or referendum measure proposed by petition as herein provided, be not submitted at the election specified in this section, such failure shall not prevent its submission at a succeeding general election. . . ." (Art. IV, Sec. 1.)

A decision by the Supreme Court of the United States that the measure was entitled to be and should have been on the ballot of Nov. 2, 1948, would right the wrong that has been done; it would place it on the next general election ballot, Nov. 7, 1950.

Statutes Involved.

The statutes involved are California Constitution, Article IV, Section 1; Article XVIII, Sections 1 and 2; Article I, Sections 2 and 3 Constitution of the United States, Article IV, Section 4, and the 9th and 10th Amendments; 8 U. S. C. A. 43, Section 1979; 28 U. S. C. A. Sec. 1257.

The text of these statutes, or such portions thereof as are applicable, are set forth in the Appendix to this Petition.

Questions Presented.

(1) Does removal from the ballot of the proposed initiative constitutional amendment deny to the petitioners any of their constitutional rights under Article IV, Sec. 4, and under the 9th and 10th Amendments of the Constitution of the United States; and under 28 U. S. C. A. 1257, and 8 U. S. C. A. Sec. 1979?

(2) Does the state court decision deny to petitioners their right to the exercise and enjoyment of the people's reserved legislative powers?

(3) Does the decision of the state court constitute a denial of a republican form of government when it prevents petitioners and the people from using their reserved legislative powers?

Respectfully submitted,

KENNY & COHN,
By ROBERT W. KENNY,

WELBURN MAYOCK,

Attorneys for Petitioners.

Of Counsel:

LAWRENCE W. ALLEN,
PAUL F. FRATESSA,
WILLIAM S. SPARKS,

Supreme Court of the United States

October Term 1948

No. .....

WILLIS ALLEN, ROY G. OWENS, and CAMPAIGN COMMITTEE FOR CALIFORNIA BILL OF RIGHTS INITIATIVE CONSTITUTIONAL AMENDMENT, INC., a corporation,

Petitioners,

vs.

ARTHUR JAMES MCFADDEN and FRANK M. JORDAN as Secretary of the State of California,

Respondents

BRIEF IN SUPPORT OF PETITION.

Petitioners' argument to this court, in support of this petition for writ of certiorari, is more fully stated in that portion of the record entitled "Interveners' Answering Memorandum of Points and Authorities" and petitioners respectfully direct this court's attention to same.

The writ of mandate attacked by this petitioner has interfered with the legislative powers which the people have reserved to themselves, including the right of the people to amend the state constitution "at the polls independent of the legislature."

Just as no one of the three branches of government may be permitted directly or indirectly to use their delegated

power in such a manner as to interfere to any degree with the exercise of power elsewhere deposited, they may not invade the legislative powers of a self-governing people. To do so is to violate the 9th and 10th admendments of the constitution, and to deprive the people of the guarantee of a republican form of government.

The heart of our constitutional system is found in the proposition that each branch of the government must be free from the domination, control, or interference of any other branch of the government. Out of this concept has developed the doctrine of separation of powers.

This doctrine has been applied to the three branches of government in order to insure the independence of each branch. The "checks and balances" to be exercised by each branch against the others, which were so much relied upon by the framers of our constitution, could only be accomplished by independent agencies; a subjugated executive could scarcely check a dominating congress and a frightened judiciary could not resist an aggressive president. Genuine independence requires freedom from invasion by other agencies.

In the case of *O'Donoghue v. United States,* 289 E. S. 516, holding that the legislature could not reduce salaries because such power would provide the means for its control of the judiciary, the court said:

> "If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into ef-

fect the purposes of the Constitution, but in the sense that the *acts of each shall never be controlled by or subjected, directly or indirectly, to the coercive influence of either of the other departments.* James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings *'should be free from the remotest influence, direct or indirect, of either* of the other two powers.'" (See also *Humphries Executors v. United States,* 295 U. S. 602; *Bailey v. Drexel Furniture Co.,* 259 U. S. 20; *United States v. Owlett,* 15 Fed. Supp. 736.)

The writ of mandate obtained by the respondent McFadden invades the area of government reserved to the people by the 9th and 10th amendments when it prevents the exercise by the people of their reserved legislative powers to vote upon the proposed initiative constitutional amendment.

Under the federal constitution the judiciary may exercise only its judicial power; the remaining governmental powers are exercised by the legislative or executive branches or reserved to the states and the people. *The 9th and 10th amendments to the constitution of the United States.*

Article I, Section 3 of the California constitution says:

> "The State of California is an inseparable part of the American union, and the Constitution of the United States is the supreme law of the land."

Article I, Section 23 of the Constitution of California says:

> "This enumeration of rights shall not be construed to impair or deny others retained by the people."

The people hold a two-fold position. They are the sovereign, the source of all delegated governmental powers; at the same time they, as the sovereign, perform essential and separate governmental functions.

In California one of the governmental functions reserved to and exercised by the people is its legislative function to "propose laws and amendments of the constitution, and to adopt or reject the same, at the polls, independent of the legislature."

As the sovereign, the people reserved to themselves and to the state the powers not delegated to other branches of government. The 9th and 10th amendments were adopted to make explicit what was already implicit.

The critical balance between limitless power, which is tyranny, and a constitutional democracy (a republican form of government), can be maintained only by constant popular supervision, and then only if the people can exercise, and are permitted to exercise, their governmental powers without obstruction or interference by the agencies supervised.

If any of the branches exercising delegated powers oversteps its authority, the power and opportunity for correc-

tion remains in the people; but if the power of the people as a sovereign is invaded, a republican form of government disappears.

> It would be an abuse of judicial power for the court *to attempt to interfere* with the constitutional discretion of the legislature. *Bridge Co. v. U. S.*, 105 U. S. 470, 482 (See also *Yick Wo v. Hopkins*, 118 U. S. 356; *Grosjean v. American Trust Co.*, 297 U. S. 233; *United States v. Cruikshank*, 92 U. S. 542; *Spier v. Baker*, 120 Cal. 370, 379; *Thomas v. Collins, supra*, 323 U. S. 516, 545; *City of Chicago v. Tribune Co.*, 139 N. E. 86, 28 A. L. R. 1368.)

If the judiciary may not even attempt to interfere with the legislature, then how much less may the judiciary attempt to interfere with the legislative functions of the people?

> "Libanius says, that at 'Athens a stranger, who intermeddled in the assemblies of the people, was punished with death.' This is because such a man usurped the rights of sovereignty." (Montesquieu, Spirit of Laws (Cincinnati 1873) Vol. 1, p. 10.)

If it is necessary that the branches of the government, having only delegated authority, remain independent (doctrine of separation of powers), can it be doubted that it is essential that the people exercising reserved sovereign powers retain complete independence? Otherwise, an agency possessing only delegated authority would be free to suppress the sovereign powers of the people.

Conclusion.

For the reasons above, and for the reasons set forth more fully in that portion of the record entitled "Interveners' Answering Memorandum of Points and Authorities," the petitioners respectfully request the issuance of the Writ of Certiorari.

Respectfully submitted,

KENNY & COHN,
By ROBERT W. KENNY,

WELBURN MAYOCK,
Attorneys for Petitioners.

Of Counsel:

LAWRENCE W. ALLEN,

PAUL F. FRATESSA,

WILLIAM S. SPARKS,

APPENDIX.

Statutes Involved.

California Constitution, Article IV, Section 1. "Legislative Department. Legislative Power Vested in Senate and Assembly. Section 1. The legislative power of this State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature . . ."

"If for any reason any initiative or referendum measure, proposed by petition as herein provided, be not submitted at the election specified in this section, such failure shall not prevent its submission at a succeeding general election . . ."

Article XVIII. Amending and Revising the Constitution. Constitutional Amendments. Section 1. "Any amendment or amendments to this Constitution may be proposed in the Senate or Assembly, and if two-thirds of all the members elected to each of the two houses shall vote in favor thereof, such proposed amendment or amendments shall be entered in their Journals, with the yeas and nays taken thereon; and it shall be the duty of the Legislature to submit such proposed amendment or amendments to the people in such a manner, and at such time, and after such publication as may be deemed expedient. Should more amendments than one be submitted at the same election they shall be so prepared and

distinguished, by numbers or otherwise, that each can be voted on separately. If the people shall approve and ratify such amendment or amendments, or any of them, by a majority of the qualified electors voting thereon such amendment or amendments shall become a part of this constitution."

Section 2. "Whenever two-thirds of the members elected to each branch of the Legislature shall deem it necessary to revise this Constitution, they shall recommend to the electors to vote at the next general election for or against a convention for that purpose, and if a majority of the electors voting at such election on the proposition for a convention shall vote in favor thereof, the Legislature shall, at its next session, provide by law for calling the same. The convention shall consist of a number of delegates not to exceed that of both branches of the Legislature, who shall be chosen in the same manner, and have the same qualifications, as members of the Legislature. The delegates so elected shall meet within three months after their election at such place as the Legislature may direct. At a special election to be provided for by law, the Constitution that may be agreed upon by such convention shall be submitted to the people for their ratification or rejection, in such manner as the convention may determine. The returns of such election shall, in such manner as the convention shall direct, be certified to the Executive of the State, who shall call to his assistance the Controller, Treasurer, and Secretary of State, and compare the returns so certified to him; and it shall be the duty of the Executive to declare, by his proclamation, such Constitution, as may have been ratified by a majority of all the votes cast at such special election, to be the Constitution of the State of California."

Article I. Sec. 2. Purpose of Government. "All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have the right to alter or reform the same whenever the public good may require it."

Article I, Sec. 3. United States Constitution Supreme Law. "The State of California is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."

Constitution of the United States, Article IV, Section 4. "1. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the executive (when the Legislature cannot be convened) against domestic violence.

Ninth Amendment. Section 1. "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."

Tenth Amendment. Section 1. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

8 U. S. C. A., Sec. 43. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S., Sec. 1979.

28 U. S. C. A., Sec. 1257 (3). Final judgment or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.